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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-1488

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
Appellant,

vs.

STATE OF NEW MEXICO, et al.,
Appellees.

On Appeal from the United States District Court for the District of New Mexico

BRIEF OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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Subject Index

	Page
Interest of amicus	1
Opinion below	3
Introduction	3
Argument	4
I The Act exceeds the limits of the powers granted by the Property clause	4
II The Act is not grounded on the powers granted by the Commerce clause	8
III The Act infringes the powers reserved to the states by the Tenth Amendment	12
Conclusion	16

Table of Authorities Cited

Cases	Pages
Afroyim v. Rusk, 387 U.S. 253 (1967)	3
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	6
Carey v. South Dakota, 250 U.S. 118 (1919)	14
District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975)	12, 13
Fry v. United States, ... U.S. ..... n.7, 95 S.Ct. 1792	12, 13
Geer v. State of Connecticut, 161 U.S. 519 (1896)	5, 14, 15
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	10

	Pages
Katzenbach v. McClung, 379 U.S. 294 (1964)	10
Lacoste v. Department of Conservation, 263 U.S. 545 (1924)	14
Maryland v. Wirtz, 392 U.S. 183 (1968)	12
Missouri v. Holland, 252 U.S. 416 (1920)	5
Toomer v. Witsell, 334 U.S. 385 (1948)	14

Constitutions

United States Constitution:
- Article I, Section 8, Clause 3 ..... 8, 9, 10, 11, 13, 14
- Article IV, Section 3, Clause 2 ..... 3, 4, 6, 7, 9, 11
- Tenth Amendment 12, 13

Legislative Reports

Cong. Rec. H. 9058 (1971)	6
H.R. Rep. No. 480, 92d Cong., 1st Sess. 10-12 (1971)	6
S. Rep. No. 242, 92d Cong., 1st Sess. 1 (1971)	6, 11

Rules

Supreme Court Rules:
- Rule 42 1

Statutes

16 U.S.C.A.:

Section 1333	9
Section 1334	8, 15
Wild and Free-roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. §§ 1331-1340	2

Texts

Webster's, New Instructional Dictionary of the English Language (2nd Edition 1954)	5

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INTEREST OF AMICUS

This brief *amicus curiae* on behalf of Pacific Legal Foundation (hereinafter PLF) is respectfully submitted pursuant to Supreme Court Rule 42, consent to the filing of this brief having been granted by counsel for Appellant Secretary of the Interior (hereinafter Secretary) and by counsel for Appellees State of New Mexico, *et al.* (hereinafter New Mexico).

PLF has previously filed with this Court an *amicus* brief in this case on the issue of dismissal of the appeal or summary affirmance. PLF believes that for the reasons stated herein, this Court should affirm the judgment of the United States District Court for the District of New Mexico.

PLF is a nonprofit, tax-exempt, public interest legal foundation duly organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens. Ten of the 17-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where PLF's position has broad public support within the general community.

PLF has members, supporters and contributors whose land and property have been subjected to varying degrees of injury as a result of the blanket protection afforded the wild horses and burros under the terms of the Wild and Free-roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. §§ 1331-1340. As a result of the legislation, the animals are completely unrestrained and are allowed to roam at will onto private property resulting in the destruction of crops, the depletion of food supplies provided for livestock, and the injury and harassment of livestock. While the Act has provisions for the regulation of these animals, these provisions have not been effectively utilized; and at the same time the States, which would be capable of effectively regulating the animals

so as to prevent these injuries, have been stripped of the power to do so by the Act. Thus, the private landowners have been subjected to invasions of their property rights without having any adequate means of remedying such injuries.

PLF is gravely concerned with the infringement of the sovereign powers of the State to control local wild animals and the consequent injury occurring to private landowners.

OPINION BELOW

The three-judge United States District Court for the District of New Mexico, in an opinion not yet reported, declared the Act to be unconstitutional. Specifically, the district court held that wild and free-roaming horses and burros were not property over which the Federal Government could exercise dominion and control under Article 4, Section 3, Clause 2, of the United States Constitution.

INTRODUCTION

It is a familiar rule of construction of the Constitution that Congressional powers do not exist in the absence of a specifically enumerated power granted by the provisions of the Constitution itself. In *Afroyim v. Rusk,* 387 U.S. 253, 257 (1967), this Court delineated the limits of Congressional power:

> "Our Constitution governs us and we must never forget that our Constitution limits the Govern-

ment to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones."

Thus, in order for an act to be valid, it must be grounded on a specifically enumerated power.

ARGUMENT

I

THE ACT EXCEEDS THE LIMITS OF THE POWERS GRANTED BY THE PROPERTY CLAUSE

The Secretary's initial argument[1] is that the Wild Free-roaming Horses and Burros Act (hereinafter Act) is constitutional under the Property Clause, Article IV, Section 3, Clause 2 of the United States Constitution. That Clause provides in part:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

In order to reach a determination that the enactment by Congress was authorized by the Property Clause, it is necessary to conclude that wild horses and burros come within the purview of that which was intended to be a proper subject matter for regulation by the section. That wild horses and burros do not is clear.

Initially, it is apparent from the language of the Clause that the powers created by the section are

[1]Brief at 12-20.

applicable only to territories or other property "belonging to the United States." The fact that the provisions' applicability is limited to property *belonging to* the government is crucial. Property is simply that over which someone exercises dominion and control to the exclusion of others. Webster's, *New Instructional Dictionary of the English Language* (2d ed. 1954). Traditionally, wild animals *(ferae naturae)* have been viewed as the antithesis of property; they are "wild" because no dominion and control is exercised over them. Thus, "wild birds [and presumably horses and burros] are not in the possession of anyone; and possession is the beginning of ownership." *Missouri v. Holland,* 252 U.S. 416, 434 (1920). It is for this reason that wild animals, being incapable of ownership, have been considered as a natural resource of the State in which they are found to exist and are to be held in trust by that State for the benefit of all citizens. This Court has stated:

> "We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity, as the representative and for the benefit of all its people in common." *Geer v. State of Connecticut,* 161 U.S. 519, 529 (1896).

The Act does not provide the Secretary with the power to sell, convey title, or transfer legal ownership of the animals, which are common incidences of ownership. The legislative history reveals that it was the conclusion of Congress that the wild free-roaming horses and burros belonged "to no one individual.

They belong to all the American people." S. Rep. No. 242, 92d Cong., 1st Sess., at 1 (1971). "They are not claimed as property of the Federal Government." Cong. Rec. H. 9058 (1971).

Thus the United States recognized its inability to exercise dominion and control over the wild horses and burros and by its own admission stated that it does not have ownership of these animals, but rather is merely exercising jurisdiction over them. No provision is made in the Act for transfer of ownership, and specific sales provisions and limitations were dropped from earlier versions of the Act. H.R. Rep. No. 480, 92d Cong., 1st Sess., at 10-12 (1971).

Provisions expressly omitted by the Congress cannot be read into the final enactment of the legislation. Thus, in the absence of a showing that wild horses and burros are property belonging to the government, the Property Clause by its own terms is inapplicable.

In addition to the ownership deficiency, there are other difficulties in relying on the Property Clause to provide the power to enact this legislation. Historically, the Property Clause has been construed as empowering Congress to enact legislation relating to public lands; that is, real property. It is true, as the Secretary contends, that the powers created by the Clause have been expanded to include the regulation of that which the land contains. (*Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 333 (1936).) But the Secretary is incorrect in his assumption that because Congress has been empowered, pursuant to the powers created by the Property Clause, to regu-

late what the land contains, it may also regulate non-public lands and in addition anything that comes into contact with public lands. In those cases, wherein the power to regulate has been extended to that which the land contains, a clear pattern can be shown to exist. The power exists in accordance with those rights that are typically considered common incidences of real property ownership; that is, the regulation of mineral and riparian rights. In no instance has the power been extended to include the regulation of any object that is shown to be physically present on public lands in the absence of a showing that the regulation is necessary to protect and preserve the public lands. As the Court below noted:

> "The common thread running through the cases decided under the Territorial Clause is that of *protection* of the public lands from damage of some kind. [Citation omitted.]
>
> "There is no Congressional finding nor any evidence to indicate that wild horses and burros are damaging the public lands. The statute is aimed at protecting the wild horses and burros, not at protecting the land they live on. Thus, we find that the Wild Free-roaming Horses and Burros Act cannot be sustained as an exercise of the power granted to Congress in Art. IV, § 3 of the Constitution." *New Mexico v. Morton,* Mem. Dec. at 5. (Emphasis in original.)

One final point deserves attention when considering the attempt by Congress to base the Act on the powers created by the Property Clause. As stated above, the Clause provides Congress with the power to regulate "territories or other property belonging to the

United States." Congress has clearly exceeded any power which is vested in it by the terms of the Clause, even should it be found to have the power to regulate wild horses and burros on federal land, in extending the terms of the Act to include regulation of wild horses and burros on State and private lands.[2] The power created to regulate federally-owned public lands simply cannot be extended to regulate non-federal lands.

II

THE ACT IS NOT GROUNDED ON THE POWERS GRANTED BY THE COMMERCE CLAUSE

The Secretary's secondary contention that the authority for enacting the legislation regarding wild horses and burros can be found in the Commerce Clause[3] is without merit.

Initially, it is clear from the congressional findings and the policy behind the Act (Title 16, United States Code, Sections 1331-1340), as noted by the Court below, that the Act is grounded on the Property Clause. Section 1331 provides that:

> "Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; *and to accomplish this they are to be considered* in the area where presently found, as *an integral part of the natural system of the public lands.*" (Emphasis added.)

[2] *See* 16 U.S.C.A. § 1334.

[3] U.S. Const. Art. I, § 8, Cl. 3.

Section 1333 authorizes and directs the Secretary to protect and manage wild free-roaming horses and burros "as components of the public lands." The absence of any mention of a reliance on the Commerce Clause is significant. It was the clear intent of Congress, as can be seen from a reading of the Act, to consider wild horses and burros as a part of the public lands and therefore subject to the regulatory powers created under the Property Clause.

Although Congress is granted the power to regulate commerce, that power must be consciously exercised. And it may not be exercised, without the express intent of Congress, by an administrative agency as an exercise in *post hoc* litigation strategy. As the court below stated:

> "The Government argues in its brief that the Act may be sustained as an exercise of the power granted in the Commerce Clause. No evidence was presented to support this theory . . . . Further, the Congress made no findings to indicate that it was in any way relying on the Commerce Clause in enacting this statute. This argument must fail." *New Mexico v. Morton,* Mem. Dec. at 6.

The cases cited by the Secretary in support of the premise that it is not necessary to establish a con-

gressional finding that the Commerce Clause has been relied on are distinguishable from the present case. Although there is language in *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), and *Katzenbach v. McClung,* 379 U.S. 294 (1964), suggesting that it is unnecessary for Congress to make a particularized finding that commerce has been affected or that it is relying on the Commerce Clause, the Secretary has ignored the fact that in each of these cases the legislative history evidenced in detail the burdens on commerce. This Court stated in *Heart of Atlanta Motel* at 252:

> "While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens . . . upon interstate commerce."

In *Heart of Atlanta Motel* the court made specific reference to hearings before the Senate Committee on Commerce and various other congressional reports wherein it was made clear that burdens on commerce were present and that the Commerce Clause had been relied on. Thus, it was unnecessary to include a particularized finding to that effect in the final legislation itself.

The same is true of *Katzenbach v. McClung, supra* at 299. This Court held that:

> "[W]hile no formal findings were made, which of course are not necessary, it is well that we make mention of the testimony at these hearings. . . . The record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants."

It is clear that in the cases wherein it was stated that no finding of reliance on the Commerce Clause was necessary, the record was replete with evidence that Congress was relying on the Commerce Clause. There is no indication of such reliance in the present case. In fact, all the evidence is to the contrary. It is true that Congress exhibited a concern for the welfare of the wild horses and burros in the reports cited by the Secretary; but it is also true that this concern, which was subsequently manifested in the legislation, was based on a finding that the wild horses and burros were an integral part of the public lands and therefore subject to the regulatory powers of the Property Clause.

The conclusion that Congress relied on the Property Clause and not the Commerce Clause is inescapable. It is repeatedly stated throughout the congressional records that the intent and primary purpose of the Act was the protection of wild horses and burros from man; and this was to be accomplished by considering the animals an integral part of the natural ecological system of the public lands (S. Rep. No. 242, 92d Cong., 1st Sess., at 1 (1971)). It was not stated that the protection of the animals was to be accomplished pursuant to the power to regulate interstate commerce.

III

THE ACT INFRINGES THE POWERS RESERVED TO THE STATES BY THE TENTH AMENDMENT

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *District of Columbia v. Train,* 521 F.2d 971 (D.C. Cir. 1975), the court recently considered the issue of the limitations placed on the commerce power by the Tenth Amendment:

> "Although this [tenth] amendment does not on its face purport to place any limitation on the exercise of powers delegated to the federal government by the commerce clause, the Supreme Court recently observed that it does have some substantive meaning:
>
> > 'While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," *United States v. Darby,* 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.'
>
> *Fry v. United States,* ..... U.S. at ..... n.7, 95 S.Ct. [1792] at 1795 n.7." *Id.* at 993.

The court continued with a discussion of *Maryland v. Wirtz,* 392 U.S. 183, 196 (1968), wherein it was

noted that the limits inherent in the Commerce Clause gave the Court "ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.' "

It was therefore the conclusion of the court, based on the Supreme Court's interpretation of the Commerce Clause powers in *Fry,* that:

> "[T]he extent of federal intrusion into state sovereignty is of some relevance even where the federal regulations are an exercise of the commerce power. Since the Tenth Amendment was described in *Fry* as declaring 'the constitutional policy that Congress may not exercise power *in a fashion* that impairs the States' integrity or their ability to function in a federal system,' the restrictions may be directed to the manner in which the federal government exercises its commerce power. In other words, the Tenth Amendment may prevent Congress from selecting methods of regulating which are 'drastic' invasions of state sovereignty where less intrusive approaches are available." *District of Columbia v. Train, supra* at 994. (Emphasis in original.)

In the absence of a showing that the Constitution has granted to Congress the power to regulate wild horses and burros, or in the alternative, in the absence of a showing that the States have been prohibited by the Constitution from exercising the power to regulate wild horses and burros, the Tenth Amendment grants such powers of regulation to the States. Having established that Congress lacked the power to enact the legislation, the attempts by Congress to regulate wild horses and burros constitute an in-

fringement of the sovereign powers reserved to States and the people.

This Court has traditionally held that the power to regulate wild animals is reserved to the States, indicating that, insofar as wild animals within a State are capable of ownership, they are owned by the State in its sovereign capacity for the benefit of its people. (*Lacoste v. Department of Conservation,* 263 U.S. 545 (1924); *Geer v. State of Connecticut,* 161 U.S. 519 (1896); *Carey v. South Dakota,* 250 U.S. 118 (1919).) The theory of placing legal ownership in the States—although the ownership concept is merely a legal fiction—continues to be utilized as a method of establishing the regulatory powers of the States with regard to wild animals. *Toomer v. Witsell,* 334 U.S. 385, 402 (1948).

The Secretary's contention that he has the authority to regulate wild horses and burros based on the powers delegated to Congress by the Commerce Clause contravenes the case law established by this Court in *Geer v. Connecticut,* 161 U.S. 519 (1896). The Federal Government cannot, pursuant to the powers delegated to it by the Commerce Clause, deprive the States of the power to regulate wildlife. In *Geer, supra* at 534, this Court held that since the States hold title to wild animals for the benefit of all the inhabitants of the State, wild bird and animal life was excluded from the operation of the Commerce Clause. As this Court there noted:

> "The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be more the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected." *Geer* at 534.

The problems created by the current wild horses and burros situation clearly represent an instance in which regulation is more appropriately left to the States. The Federal Government is ill equipped to deal with the difficulties stemming from the presence of wild horses and burros on private property. Reviewing the problems that are caused by the wild horses and burros, it becomes clear that many are of a peculiarly local character. Private landowners have been subjected to invasions of their property rights and have been left without an effective method of remedying the injuries sustained. *New Mexico v. Morton,* Mem. Dec. at 1-2. It has been found that the wild horses and burros enter private property resulting in the destruction of feed provided for livestock and the harming or disturbing of livestock. *Id.* at 2. Although there is a procedure provided in the Act for occurrences of this nature whereby the Bureau of Land Management or federal marshals are to be called for assistance, 16 U.S.C.A. § 1334, the implementation of the provision has not been successful. The Bureau of Land Management has not been able to respond effectively to the requests for assistance (Mem. Dec. at 2). Thus, it becomes apparent that the most effective method of eliminating the damage occurring to private property is to retain the regulatory powers in the governmental entity most

capable of dealing with the problem. In this case it is clear that the State or local government, because of its knowledge of the problems and its ability to respond quickly, is best suited to regulate effectively the wild horses and burros and prevent damage to the property of its citizens.

CONCLUSION

The Secretary has failed to show any constitutional authority for the Act. Therefore, PLF, as *amicus curiae,* urges that the decision of the district court be affirmed.

Respectfully submitted,

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